No. 88-282 (4)

In The

Supreme Court of the United States

October Term, 1988

WILLIAM ALTER, UNITY VENTURES, and LA SALLE NATIONAL BANK,

Petitioners,

v.

EDWIN M. SCHROEDER, NORMAN C. GEARY, GEORGE BELL, VILLAGE OF GRAYSLAKE, and COUNTY OF LAKE,

Respondents.

Petition For a Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CLIFFORD L. WEAVER*
ROBERT C. NEWMAN
FRED P. BOSSELMAN
BURKE, BOSSELMAN & WEAVER
55 W. Monroe, Suite 800
Chicago, Illinois 60603

Attorneys for Respondents

Of Counsel:

FRED L. FOREMAN
STATE'S ATTORNEY OF LAKE COUNTY
18 North County Street
Waukegan, Illinois 60085
(312) 360-6644

**Counsel of Record*

Pandick Technologies, Inc., Chicago • (312) 236-0200

40 pp

QUESTIONS FOR REVIEW RESTATED

1. Whether the Seventh Circuit Court of Appeals properly determined that petitioner failed to satisfy the most basic threshold of ripeness in that "Alter failed to make any effort to obtain a final, reviewable decision before any governmental entity..."? *See Unity Ventures v. Lake County*, 841 F. 2d 770, 775 (7th Cir. 1988).

2. Whether, even if Petitioner's claims were ripe, the Seventh Circuit's decision should be affirmed based on the finding of the District Court that "A painstaking review of the record establishes that...[petitioner] utterly failed to meet the burden of showing that the defendants' reasons were either pretextual or not reasonably related to a legitimate government purpose or concern"? *See Unity Ventures v. County of Lake*, 631 F. Supp. 181, 200 (N.D. Ill. 1986).

3. Whether the Seventh Circuit Court of Appeals properly determined that petitioner's antitrust claim was barred by the state action doctrine?

4. Whether the District court properly granted judgment and judgment N.O.V. for all defendants on all counts?

STATEMENT REQUIRED BY RULE 28.1

Respondents Village of Grayslake and County of Lake are municipal corporations that have no parent companies, nor any affiliates or subsidiaries.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases *Page(s)*

Cases *Page(s)*

Cases *Page(s)*

Cases *Page(s)*

Constitutional Provisions

Statutes

Miscellaneous

In The
Supreme Court of the United States
October Term, 1988

No. 88-282

WILLIAM ALTER, UNITY VENTURES, and LA SALLE NATIONAL BANK,

Petitioners,

v.

EDWIN M. SCHROEDER, NORMAN C. GEARY, GEORGE BELL, VILLAGE OF GRAYSLAKE, and COUNTY OF LAKE,

Respondents.

Petition For a Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully request that the Petition for Writ of Certiorari be denied.

STATEMENT

Recognizing an advocate's obligation to portray facts most favorably to his client, petitioner's statement of the "facts" nevertheless conveys a seriously distorted picture of the case. Respondents address the most serious distortions in Part I of their argu-

ment.

Petitioner's summaries of the District and Circuit Court opinions are also distorted. In essence, the District Court, after erroneously denying respondents' pre-trial motion to dismiss for lack of ripeness, granted respondents' post-trial motion for judgment N.O.V. on the basis that petitioner "utterly failed" to prove any violation of either the civil rights or antitrust laws. Pet. 75a.

The Seventh Circuit held that the trial court erred in even letting the case proceed to trial because "[petitioner] failed to make any effort to obtain a final, reviewable decision before any governmental entity...." Pet. 10a.

REASONS FOR DENYING THE WRIT

I. PETITIONER'S STATEMENT OF THE FACTS MISCHARACTERIZES THE NATURE OF THE CASE

A. There Was Nothing Improper About the Sewer Agreement Between Lake County and Grayslake

Petitioner does not challenge the facial validity of the Grayslake sewer agreement. Pet. 14a. There is no basis for such a challenge. Judge Bua, the trial judge, found that the agreement was valid under Illinois law and executed for constitutionally proper purposes. Pet. 55a, 78a, 87a-88a. Nevertheless, in an effort to get his case before this Court, petitioner attempts to cast the agreement in a sinister light. Petitioner refers to it as "previously undisclosed," as containing a "veto power [that] was absolute and not subject to any prescribed standards," and as being unlike other sewer agreements executed by Lake County. Pet., p. 6.

None of this innuendo finds support in the record. The Grayslake agreement, PX 30, along with numerous similar agreements, DX 135a-135-jj, was executed as part of, and as a requirement of, a federal clean water program designed to replace numerous, inadequate village sewer plants with a system of large regional plants, Tr. 79-83. Prior to regionalization,

Grayslake operated its own sewer plant and, under Illinois law, this gave it some control over development in areas immediately surrounding its boundaries. Tr. 154-55; Pet. 78a. To induce Grayslake to participate in the regional system, Lake County agreed to allow the village, like many other municipalities, to retain some of this control through a "sphere of influence" provision in its agreement. Tr. 153-58; DX D; Pet. 76a-77a.

This "sphere of influence" provision, which petitioner now characterizes as a standardless "veto," said simply:

> The county shall preserve the function of the county interceptors located within the sphere of the village...by not permitting any direct connection thereto...unless the village consents in writing to such direct connection.

PX 30, p. 8. Thus, by its terms, the agreement limited Grayslake's right to withhold its consent to situations in which (1) a direct connection (*i.e.* a large connection, too large to connect through any existing system's connection) to the interceptor sewer that Grayslake had contracted to use (2) threatened the functional ability of that interceptor to provide that contractual service. Those standards are perfectly sufficient under Illinois law, *Airtex Products, Inc. v. Pollution Control Board*, 15 Ill. App. 3d 238, 242-43, 303 N.E.2d 498, 502 (5th Dist. 1973), *aff'd*, 60 Ill. 2d 204, 326 N.E.2d 406 (1975).[1]

Eight other Lake County sewer agreements had provisions similar to the Grayslake "sphere of influence" provision. *See* DX D, 135b, 135v, 135x, 135cc, 135dd, 135gg, and 135jj. All of these agreements, including the Grayslake agreement, were approved at formal public meetings of the Lake County Board and the other governments involved. *Id.* All were subjected to extensive legal review before being executed.[2]

---

[1] Judge Bua rejected petitioner's "veto" claim and found this provision was intended to, and did, foster intergovernmental cooperation. Pet. 74a-80a.

[2] Petitioner alludes to the fact that the agreement was reviewed by a lawyer who, years after it was executed, questioned its validity. Pet., p. 7. That lawyer

(Footnote continued on the following page)

B. Petitioner Failed To Obtain Any Decision From Anyone

Petitioner had one private meeting with the Mayor of Grayslake and, on that basis, alleges the denial of sewer service. There is not one iota of evidence to show that petitioner thereafter ever lifted a finger to obtain public sewer service. Neither before nor after that meeting did petitioner ever file a formal application or follow any formal procedures to obtain service.

Illinois law required that a formal Illinois Environmental Protection Agency ("IEPA") application had to be completed and approved by Lake County before petitioner could connect to the county interceptor. Tr. 144-46, 357-58; DX 228, ¶6.5. Under the Grayslake sewer agreement, PX 30, p. 8, Lake County was contractually bound to disapprove direct connections to the sewer serving Grayslake (the "Northeast Central system") if, but only if, the connection would impair the system's functional ability to serve Grayslake. Any direct connection that would impair that ability required Grayslake's written consent. *Id.*

Lake County's staff advised petitioner that he had to file the formal IEPA application. DX 54. If the IEPA application had been filed, Lake County would have been required to certify as to whether or not the Northeast Central system had adequate capacity to accomodate petitioner's proposed development. Tr. 144-46, 357-58; DX 228, ¶6.5. Nevertheless, the unrefuted evidence shows that petitioner made a conscious decision not to file that application because he did not want to spend the money it would cost to develop the necessary engineering data. Tr. 755, 757; DX 228, ¶5.1.[3]

---

2 *(Continued)*
was a first-year associate attorney. However, the evidence at trial showed that the agreement had also been reviewed by several experienced municipal and bond attorneys before it was executed, with no question concerning its legality. DX 33, 38, 41, and 44; Tr. 152-53, 219, 222, 1323-25, 1338-40, 1352, 1451-54, and 1458-63.

[3] In lieu of the required application, petitioner provided only two sketchy maps, PX 48, showing proposed alternative sewer lines originating in empty country-

(Footnote continued on the following page)

Because petitioner refused to file the IEPA application, he never obtained *any* decision from Lake County concerning the adequacy of the system to accomodate his proposed development. Furthermore, because he never supplied any data that would allow Lake County to decide whether or not his development would impair the system's functional ability to serve Grayslake, the Lake County Board was never in a position to decide whether or not Grayslake's written consent to the connection was required.[4]

If the consent of Grayslake had been required, it is clear that only the Grayslake Board of Trustees, and not the Mayor of Grayslake, could give that consent. Under Illinois law, a village mayor does not have the right (except in special circumstances) even to vote on matters brought before the village board, much less the right to bind the village by comments made at a private meeting with a developer. Ill. Rev. Stat. ch. 24, §§3-11-14 and 3-12-2. Furthermore, under Illinois law, village boards cannot make any final decision about anything except at a properly noticed public meeting called for the purpose with a quorum in attendance. *See* Illinois Open Meetings Act, Ill. Rev. Stat. ch. 102, §§41-46.

---

3 *(Continued)*
side. As petitioner's witness William Byers observed, looking at the only documentation petitioner ever prepared, "[t]his particular map here, I wouldn't even know what it is." Tr. 382. In submitting that documentation to Lake County's staff, petitioner's own engineer acknowledged that "detailed plans for submittal" had yet to be prepared. DX 180. In reacting to those plans, the Lake County staff referred to them as "conceptual" and advised petitioner of the need to submit "detailed engineering documents...as part of the Illinois EPA permit process." DX 54.

[4] Petitioner asserts that the Lake County Board refused to repudiate the Grayslake agreement. Pet., p. 7. In fact, not even that issue ever came before the full Lake County Board; it was discussed only by the Board's Public Service Committee. Petitioner, however, did not appear at that meeting, Tr. 1536-37, and never sought to take the issue to the full County Board, Tr. 852-53. In any event, a decision not to repudiate the agreement hardly qualifies as a decision to deny petitioner a sewer connection pursuant to the agreement. Neither the Lake County Board nor its Public Service Committee was ever presented a specific proposal or made any decision rejecting a connection for petitioner.

Petitioner, however, would encourage the violation of these "government in the sunshine" provisions by arguing that his private, evening meeting with one, non-voting member of the Grayslake Board is sufficient to constitute final action binding the Village. But, under Illinois law, nothing that was said at that private meeting could bind the Village to anything or deny petitioner of anything. Indeed, it would be most troublesome if the federal courts were to ignore the Illinois Open Meetings Act by holding that petitioner could rely on that meeting. Such a decision would only encourage developers and others to avoid debate in the public forum in favor of "one-on-one" private meetings with elected officials.

The plain fact is that petitioner should have sought formal approval of the Grayslake Board at a regular public meeting because, as the Seventh Circuit found:

> If [petitioner] had presented a formal application to the Grayslake Board of Trustees with adequate documentation about the density of the proposed development and the anticipated volume of sewage the connection would have to accommodate, then the Village could have made a reasonable decision about the Northeast Interceptor's ability to handle the excess.

Pet. 12a. The purpose of forcing formal compliance is clear and important. Until squarely faced with a decision that must be made *and with all the supporting evidence*, it is too easy for the responsible agency to avoid facing the issue. Like any free advice, a preliminary, informal reaction, based on incomplete data, is worth what you pay for it. If petitioner wanted a firm and final decision, he had an obligation to present his case. He refused to present his evidence to the local decisionmakers and, thus, it is not surprising that he did not get a decision.

Having refused to apply for a formal decision, petitioner now tries to excuse that refusal by claiming that, "...in Illinois there is no formal procedure for obtaining a connection to a public sewer." Pet., p. 19. That statement is blatantly inaccurate. The Seventh Circuit has so found. Pet. 11a-12a.

The Lake County IEPA application procedure has already

been discussed. There is no mystery about it. The forms are in the record. DX 228. Nor is there any mystery about how you get a decision from the Grayslake Board of Trustees.

Petitioner portrayed himself as a sophisticated developer who knew how to get things done. Tr. 651, 693. He certainly knew that if you want a village board to decide something, you ask to have it put on the agenda of a public meeting--or, if that's too hard, you stand up at one of the board's regular meetings and ask for a decision. That's how it works everywhere, and that's how it works in Grayslake. Tr. 1464-65. Petitioner, however, did nothing. Tr. 1480-81. Petitioner concedes that he never presented his sewer connection proposal to the Grayslake Village Board and never even sought to appear before the Board. Tr. 851.[5]

Petitioner is thus left to rely on that one brief, informal meeting he had with Grayslake's Mayor. But even if Illinois law allowed such reliance, it is plain that even what the Mayor said was not in any sense "final."

When petitioner met with Mayor Schroeder, Grayslake was evaluating a possible annexation of the "Heartland" project, a proposed 2,500 acre development. According to the Mayor's uncontroverted testimony, Grayslake wanted to evaluate the sewer capacity requirements involved before deciding whether there was sufficient capacity to accomodate petitioner's connection. Tr. 268-69. Under questioning by petitioner's counsel, Mayor Schroeder said:

> ...we had to find out what the use would be of the

---

[5] The minutes of the February 21, 1981 Grayslake Village Board meeting, PX 145, illustrate how simple it was to bring a matter before the Board. Those minutes recorded under the heading "Audience," that "Barbara Bye presented a letter signed by the residents of the Garfield and Lincoln areas requesting the installation of a street light." The minutes also record that "Trustee Smith moved to approve the request of the American Unit of Home Bureau..."; "Trustee Christian moved to approve the request of the Jaycees..."; and that "Trustee Lucus moved to adopt the resolution proposed by the Lake County Regional Plan Commission...."

> potential annexations coming up, and then after we found that out, there would be some intelligent discussions as to what the future capacity would be.

Tr. 269. Petitioner himself testified that Mayor Schroeder said simply that "he didn't know *at what time* that answer would be available." Tr. 753. (emphasis added).

Subsequently, Mayor Schroeder sent a letter, also signed by the members of the Grayslake Village Board, to the Lake County Board. The letter asked that the County Board not repudiate its municipal sewer service agreements. However, the letter also reaffirmed Grayslake's willingness to consider petitioner's request for sewer connections:

> As a matter of record, *Grayslake has never taken the position that it will never consent to the connection by [petitioner's development.* Petitioner] was told that when those [Heartland] developers who are interested in annexing to Grayslake in the area immediately South and East to the Village annex of Grayslake then *consent would be given for the connection if sufficient capacity was available* in the County sewer to absorb development.

PX 111, p. 2 (emphasis added).

The uncontroverted evidence thus shows that the possibility of petitioner obtaining a sewer connection remained an open issue, intertwined with the question of how much future capacity would be available. Because petitioner never prepared and submitted a formal request or otherwise pressed the issue, no decision was ever made.

C. There Is a Reason Petitioner Did Not Seek a Decision

Petitioner is, by self-proclamation, a talented and successful developer who, he says, specializes in finding solutions where others cannot. Tr. 651-52. Why would such a person attend one brief private meeting with the Mayor of Grayslake and then immediately and totally give up his pursuit of regional sewer service? The answer is that he didn't want regional sewer service because it was going to cost him several million dollars to get it,

Tr. 750, and he already had Round Lake Park's agreement to let him use, Tr. 724, a much cheaper, DX 118, 195, 195a (though environmentally unsound, DX 108, p. 2), "package plant" to treat sewage from his development. What is more, he talked Round Lake Park into paying for the package plant, DX 190A, § 8, *and* prohibiting petitioner's competitors from using it, Tr. 762, 843-44. That was a pretty sweet deal.

His problem was that state environmental authorities had already told him that he could not use such a package plant *unless* he could demonstrate that the regional system could not serve his needs. DX 50. And, they told him, *the much greater expense of using the regional system was no excuse. Id.*

So what petitioner needed was an excuse acceptable to Illinois environmental authorities–such as a claim that he had sought and been denied the use of the regional system. Indeed, indisputable documents in the record establish that petitioner's pursuit of his package plant included lying to those state authorities in an effort to convince them that something more than money stood between him and regional sewer service.

Round Lake Park, like Grayslake, had a sewer service agreement with Lake County that gave Round Lake Park the absolute right to send sewage from anywhere in the Village to the regional system known as Northwest system. DX 135x.[6] Petitioner's property was in Round Lake Park. Petitioner was admittedly aware of the Round Lake Park sewer agreement. Tr. 826-27. Indeed, a letter to petitioner from the Mayor of Round Lake Park specifically advised petitioner that the agreement would allow him to pursue his package plant alternative if the County refused to serve him out of the *Northwest* (not Northeast Central) system. DX 185.

At trial, petitioner admitted that he never applied to use the Northwest system. Tr. 887. But despite having never applied

---

[6] The agreement gave Round Lake Park no right to use the Northeast Central system that served Grayslake. Similarly, Grayslake had no right to use, or to prevent the use of, the Northwest system that served Round Lake Park.

to use that system, petitioner repeatedly lied to state agencies by claiming that he had been denied access to *both* the Northeast Central *and* the Northwest systems. DX 239, 239A, 189 at 1, 214, 216, and 215. In truth, however, the only thing that prevented petitioner's use of the Northwest system was his own desire for a less expensive alternative. *See* Tr. 750.[7]

Thus, it is Petitioner's desire for state approval of the cheap, exclusive package plant, Tr. 750; DX 118, 195a, that explains his half-hearted request to use the Northeast Central system and his total failure to pursue a connection to the Northwest system, the regional system that he had a clear right to use and as to which Grayslake had no rights whatever.

D. This Is Not a Case of Excluding Low Income Housing

There was no evidence at trial that any defendant acted out of any personal monetary interest or other venality, or on behalf of any private party or interest or out of any personal or political animosity toward petitioner. On the record, these were honest officials trying to deal with tough problems.

Petitioner has thus been forced to look elsewhere for some colorable claim of motivation for the alleged conspiracy against him. In an apparent effort to do that, petitioner opens his Statement of the case by characterizing himself as a "successful developer of low- and moderate-cost housing and light industrial projects...," Pet., p. 3, and fills his petition with innuendo to the effect that this case involves nothing more than an effort by

---

[7] In this Court, petitioner attempts to pass off the Northwest system on the basis that "undisputed testimony had established [petitioner's use of it] would have violated state and federal area assignments...." Pet., p. 14 n. 9. But petitioner offers no citation to that "undisputed testimony." In fact, the only evidence about "area assignements" was presented by respondents and showed that petitioner could have applied for an area boundary change and gained access to the Northwest system. Tr. 1675, 1680; DX DD. Petitioner did not apply, and his *post-hoc* rationalizations for not applying do not explain why, if he had no right to use the Northwest system, he lied about having applied for and been denied such use.

some rich people to keep out some poor people. Not a shred of evidence was offered to support those unfortunate insinuations.

Petitioner's characterizations of his plan, himself and his business have not always been the same as they are here. The development plan that Round Lake Park approved for petitioner included a shopping center, a hotel, an office park, a light industrial park and single family and multiple family housing. DX 35. At the same time petitioner was prosecuting this case, he also was prosecuting another case against several other suburban governments that he alleged were conspiring to prevent him from building *luxury* housing. *LaSalle National Bank of Chicago v. County of DuPage*, 777 F. 2d 377, 382 (7th Cir. 1985). A newspaper interview given by petitioner just last month described:

> [Petitioner's] plans for at least three major downtown projects, the most visible of which will be the world's tallest apartment building, planned for . . . 600 N. Lake Shore Drive that will include a 75-story residential building, an adjacent five-star hotel and an international promenade of retail boutiques.

Crain's Chicago Business, August 29, 1988, pp. 3 and 53. The same article noted that: "In 1987, the company's revenues topped $100 million, with profits up 40% . . . ." *Id.* at 53.

Petitioner's side-by-side charactization, without any citation to the record, of Grayslake as a municipality "ranking among the most affluent in the Chicago metropolitan area," and of Round Lake Park as a "blue-collar community with high unemployment," Pet., p. 5, is equally misleading. The image petitioner seeks to create of great socio-economic differences between the two communities is contradicted by his own evidence. Plaintiff's Exhibit 63 contains 1970 census data for 17 communities within Lake County. Three communities had median incomes ranging from approximately $20,000 to $27,500. In contrast, Grayslake had a median income of only $13,089; Round Lake Park's median income was just slightly less, $11,381. Indeed, ten of the seventeen Lake County communities, including both Grayslake and Round Lake Park, had median incomes within the relatively narrow range of $11,000 to $13,400.

Judge Bua, after a "painstaking review of the record," found no proof of illicit motives of any kind:

> The plaintiffs utterly failed to meet the burden of showing that defendants reasons were . . . pretextual. . . .

Pet. 74a-75a. Rather, Judge Bua found only evidence of legitimate concerns about sewer capacity and rational planning of development in relation to available public services:

> [T]he evidence shows *overwhelmingly* that the sphere of influence is related to a legitimate government purpose or concern . . . the availability and cost of sewer services to Grayslake residents.
>
> * * *
>
> Indeed, there was *overwhelming* evidence presented at trial that Grayslake attempted to achieve such mutual and cooperative planning with Round Lake Park regarding the Heartland and Unity developments.
>
> * * *
>
> [T]he Court holds that the evidence presented at trial shows *conclusively* that, not only was Grayslake's denial of sewer services reasonable under the sphere of influence agreement, but also the conditional grant of the Unity property's hook-up in exchange for mutual or cooperative planning of the Heartland development was reasonably related to controlling and mutually planning development lying between Grayslake and Round Lake Park.

Pet. 78a, 85a, 88a (emphasis added).

E. The Limited Capacity of the Northeast Central System and Round Lake Park's Lack of Rational Planning Were the Real Problems

As Judge Bua found, respondents' real concerns were, first, whether the limited sewage treatment capacity available was sufficient to serve petitioner and, second, how that limited capacity should be allocated in light of Round Lake Park's refusal to participate in any rational planning program.

The uncontroverted evidence shows that petitioner's proposed development was not part of capacity projections upon

which the Northeast Central system was designed and built. A letter from the Northeastern Illinois Planning Commission to the Illinois Environmental Protection Agency states:

> The population of the six hundred-acre [petitioner] development. . . *is not included* in the population projections of Northeast Central EPA Facilities Plan.

DX 96 (emphasis added). A report prepared for petitioner by a hired consultant specifically advised petitioner of this fact. DX 74, p. A004582.

It is also uncontroverted that the only sewage treatment plant serving the Northeast Central system simply did not have the capacity to handle the two large developments–petitioner and the Heartland–that were simultaneously seeking to connect to the system. When petitioner met with Grayslake's Mayor in October, 1978, the unused total capacity of the system was 4.18 million gallons per day. DX 116B. The total proposed average flow for petitioner and the Heartland was 4.72 million gallons per day, DX 116 and 116A, more than the *total* unused capacity of the plant. If petitioner and Heartland had obtained commitments for their sewer needs in 1978, there would have been no further capacity available for use in Grayslake or any of the several other communities that were originally intended to be served by that system. Any expansion of that system would have been costly and, even on optimistic assumptions, could not have occurred for almost 10 years. Tr. 372-74.

The foregoing data is the only data in the record regarding the system's capacity. The only evidence petitioner elicited was that no applicant for sewer service was rejected for lack of capacity. Tr. 369-70. That, of course, is precisely because petitioner and Heartland were not able to monopolize the limited capacity that remained in 1978.

These capacity limitations, along with similar problems affecting other public facilities, prompted Lake County and Grayslake to support the idea of a cooperative planning program to deal with these two massive developments. Grayslake voted to approve a planning program recommended by the Northeast Illi-

nois Planning Commission that would enable Grayslake, Round Lake Park and the County to work together toward a solution whereby petitioner and Heartland could be developed sensibly and also receive some sewer capacity. Tr. 1590-91; Pet. 85a-88a. The proposed compromise made perfect sense in light of the capacity concerns. Pet. 87a. Nevertheless, petitioner refused to support the proposal. Tr. 605-620; PX 126. Round Lake Park, after initialling indicating that it would agree to the proposal, repudiated it. Tr. 1466-68.

Petitioner completely mischaracterizes this proposed compromise and attempts to portray it as evidence of respondents' wrongdoing. Pet., p. 8. However, Judge Bua, an objective observer of all the evidence, found that the proposed compromise was "a desired and rational goal." Pet. 87a.[8]

II. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE SEVENTH CIRCUIT AND ANY DECISION OF THIS COURT

A. The Seventh Circuit's Decision Is Fully Consistent With This Court's Ripeness Decisions

Several recent decisions of this Court have carefully defined the ripeness doctrine in the context of challenges to local land use and development activities. There is nothing difficult or mysterious about the rules established by those cases. The circuit courts have had no great difficulty in applying them. The conflicts alleged by petitioner are manufactured and imagined,

---

[8] Petitioner also mischaracterizes challenges by Lake County and Grayslake to (1) his application for IEPA approval of his package plant, Pet., p. 8, and (2) his Round Lake Park zoning, Pet., p. 9. Lake County and Grayslake were only two of at least 18 objectors to petitioner's proposed package plant, including numerous municipalities and the North Shore Sanitary District. DX 97-107, 209-13, 218. Both the Northeastern Illinois Planning Commission ("NIPC") and the Illinois Department of Agriculture refused to recommend it, DX 108 and 110, and approval was denied, DX 113. Similarly, the litigation challenging petitioner's zoning was brought not only by Lake County and Grayslake, but also by a number of other municipalities. DX 114, 115. NIPC had recommended litigation if cooperative efforts to plan failed. Tr. 1591. That litigation is still pending.

not real.

Even if any further refinement of those rules were necessary or appropriate, this would hardly be the case in which to undertake that exercise.

At the outset, it is important to emphasize again that:

> [Petitioners] here assure us that they do not challenge the facial validity of the agreement between Lake County and Grayslake. Rather, they challenge the defendants' use of the powers granted them by the contract.

Pet. 14a. The decisions of this Court have uniformly refused to consider "as applied" challenges to regulations that have never been applied to the plaintiff. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019 (1984); *International Longshoremen's Union, Local 37 v. Boyd*, 347 U.S. 222, 224 (1954); *United Public Workers v. Mitchell*, 330 U.S. 75, 86-91 (1947); and *Congress of Industrial Organizations v. McAdory*, 325 U.S. 472, 475-76 (1945). Thus, the Seventh Circuit's decision is based squarely on the most basic and well established requirement of the ripeness doctrine: Federal Courts do not entertain "as applied" challenges to regulations that have never been applied to the plaintiff.

This Court's most recent ripeness decisions involving challenges to local land use programs have, of course, required even more than an initial application of the regulation, but no reference to those cases is needed to resolve the instant dispute. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), and *MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561 (1986). The "important questions" that petitioner suggests require the attention of this Court arise, if at all, only at the far periphery of ripeness analysis. They are certainly not presented by this case.

This is not a case in which the facts show that there was a final decision applying a local regulation to petitioner and in which the question is whether petitioner was obligated to go beyond that first denial to seek variances, or to submit alternate applications, or to pursue state remedies for compensation. This

case is much simpler than that.

The Seventh Circuit did not base its determination of prematurity on the petitioner's failure to pursue *all* avenues of relief. Quite to the contrary, the Seventh Circuit found that the petitioner had failed to present *any* formal application that would have provided a basis on which the Court could evaluate the impact and extent of the alleged denial of sewer service:

> Alter's efforts to obtain a sewer connection for the Unity property did not include a formal application to either Grayslake or Lake County, and thus did not result in a final decision. . . . Alter made no formal application to the Village Board of Trustees. Neither did he approach the Lake County Board to apply for a connection. Nor did he file a request with the IEPA to approve a connection to the Northeast Interceptor. . . . Alter . . . never applied for connection to the Northwest Interceptor. Alter failed to make any effort to obtain a final, reviewable decision before any governmental entity on his application for a sewer connection. . . . At this point, it is simply impossible for a court to determine how the Grayslake Board of Trustees or the Lake County Board would have acted on a formal application, or whether or to what extent the plaintiffs have been harmed.

Pet. 10a, 12a.

A brief summary of this Court's recent land use ripeness decisions will serve to place the Seventh Circuit's decision in proper context. In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Court found that:

> Because the appellants have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy *regarding the application* of the specific zoning provisions.

Id. at 260 (emphasis added).[9] So in this case, petitioner never submitted a formal request to any of the state or local agencies whose approval he required to connect to the public sewer sys-

---

[9] The Court then turned to a consideration of the Agins' facial challenge to the ordinance, but petitioners here raise no such challenge.

tem. Pet. 10a. *Agins* thus disposes of this case.

Williamson, supra, carried the *Agins* ripeness analysis at least two steps forward. In *Williamson*, the Court noted that "[r]espondent has submitted a plan..., and thus has passed beyond the *Agins* threshold." 473 U.S. at 187. However, the Court noted that even the rejection of that initial plan did not constitute a "final decision" sufficient to permit review of an "as applied" taking claim because the property owner could have obtained, but did not apply for, variances. *Id.* at 188-90. *See also Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). Furthermore, the Court held that the "as applied" taking claim was also not ripe because the property owner had not pursued state compensation remedies. *Id.* at 194.

In *MacDonald, supra*, the Court carried its ripeness analysis yet a step farther. In that case, the court found an "as applied" taking challenge was not yet ripe despite the fact that the property owner had submitted one subdivision proposal and had received a final decision concerning it. The Court concluded that this was not sufficient because the rejection of that proposal did not suggest that *no* proposal would be approved:

> Rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews.

Id. at 2569 n. 9. *See also Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 136-137 (1978).

The "important issue" that petitioner says *Williamson* left undecided is whether the additional requirements that *Williamson* and *MacDonald* impose beyond the "*Agins*' threshold" do or do not apply to due process and equal protection claims as well as to taking claims. *But see Williamson, supra*, 473 U.S. at 197-200. That question, however, is simply not raised in this case.

For purposes of this case *Agins*, *Williamson* and *MacDonald* all stand for the same simple, universal proposition of ripeness law: Before an "as applied" challenge to a regulation may be brought, the plaintiff must have made at least one "meaningful

application" and must have pursued it at least to the point of a "final decision" by the "initial decisionmaker." In this case, petitioner made no application, much less a "meaningful one" and, therefore, the governing bodies of the respondent local governments, which alone had authority to act as the "initial decisionmaker," were never called upon to make any decision, much less a "final decision." *Compare Abbott Laboratories v. Gardner*, 387 U.S. 136, 151 (1967) (a regulation *was* ripe for review where "[t]here is no hint that this regulation is informal...or only the ruling of a subordinate official...or tentative").

The Seventh Circuit simply had no need to, and did not, rely upon the variance, reapplication, and local remedy requirements of *Williamson* and *MacDonald* in deciding that petitioner's "as applied" challenge was premature. The Seventh Circuit required simply that "[a] final decision must be demonstrated by a development plan submitted, considered, and rejected by the governmental entity." Pet. 9a. Petitioner could not pass even that minimal threshold.

And, at that threshold level, it is quite clear that the ripeness requirement applies equally and without distinction to all "as applied" constitutional challenges to regulatory schemes, whether those challenges arise under the takings clause, the due process clause or the equal protection clause. *See Pennell v. City of San Jose*, 108 S. Ct. 849 (1988). *See also Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983). In *Pennell*, plaintiffs challenged a rent control ordinance both facially and "as applied" under both the takings clause and the due process clause. This Court held that the facial challenges were ripe for decision but that the "as applied" challenges, whether under the takings clause or the due process clause, were not ripe because the ordinance had never been applied to the plaintiffs.

The Court first considered the takings claim and found that "it would be premature to consider this contention on the present record" because the ordinance had not been applied to the plaintiffs. 108 S.Ct. at 856-57. The Court then turned to similar "as

applied" claims brought under the due process and equal protection clauses and concluded that they, like the taking claim, were not ripe because the ordinance had not been applied to plaintiffs:

> For this reason we also decline to address appellant's contention that application of [the ordinance] violates the Fourteenth Amendment's due process and equal protection requirements.

Id. at 857 n. 5 and 858 n. 7. Despite this finding that both the takings and the due process "as applied" claims were premature, the Court went on to consider the merits of the facial challenge to the ordinance based both on the takings clause and the due process clause. *Id.* at 857-59.

The *Pennell* analysis is completely consistent with this Court's previous treatment of the ripeness issue. The critical distinction–at least at the threshold level of ripeness analysis–is not between claims based on the takings clause and claims based on the due process clause. Rather, the critical distinction is between "as applied" challenges and facial challenges. *See, e.g., Agins, supra*, 447 U.S. at 260 (in the absence of a final decision on an application for development approval, an "as applied" taking claim is not ripe; however, a facial taking claim is ripe); *Pacific Gas, supra*, 461 U.S. at 201 and 203 (statutory provision requiring case-by-case analysis of nuclear storage capacity was not ripe, "because 'we cannot know whether the Energy Commission will ever find a nuclear plant's storage capacity to be inadequate'"; however a challenge to a general moratorium provision was ripe because as to it "[t]he question of pre-emption is predominantly legal. . . ."); and *Hodel, supra*, 452 U.S. at 295-96 and 304 (because the regulation had never been applied to plaintiffs, an "as applied" taking claim was not ripe, but plaintiffs' facial taking claim could be adjudicated; because civil penalty provisions had never been applied to plaintiffs, plaintiffs' "as applied" due process challenge was not ripe).[10]

---

[10]Although petitioner raised no facial challenge to the Grayslake agreement,

(Footnote continued on the following page)

B. There Is No Inconsistency Between the Seventh Circuit's Decision and This Court's Post-*Williamson* Decisions

Petitioner's claims that the Seventh Circuit's decision is inconsistent with this Court's decisions in *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378 (1987); and *Pennell v. City of San Jose*, *supra*, are completely unfounded.

Nollan involved no ripeness issue whatever. The passage quoted by petitioner, Pet., p. 24, dealt with the standard of rationality, not the standard of ripeness, to be applied in takings and due process cases. *Nollan*, *supra*, 107 S. Ct. at 3147 n.3.

First English involved neither a ripeness issue, a taking issue nor a due process issue; it involved only a remedy issue. The Court found that the unusual procedural posture of the case squarely presented the remedy issue without the need for the Court to determine whether a taking had actually occurred and was ripe for review. *First English*, *supra*, 107 S. Ct. at 2383-84.

As already discussed, the Seventh Circuit's decision is fully consistent with *Pennell*. Petitioner is simply incorrect in claiming that *Pennell* distinguished between takings claims and due process claims, Pet., p. 25; *Pennell* distinguished between facial and "as applied" claims and, within those categories, applied the ripeness doctrine in exactly the same way whether the claim arose under the takings clause or the due process clause. *Pennell*, *supra*, 108 S. Ct. at 856-57, 857 n. 5 and 858 n. 7.

---

10 *(Continued)*
the District Court, in effect, decided and rejected such a challenge on the way to deciding the "as applied" challenge. The first step in Judge Bua's "as applied" analysis was to analyze the constitutional reasonableness of the agreement. Pet. 74a-80a. The court concluded: "[T]he evidence shows overwhelmingly that the sphere of influence is related to a legitimate government purpose or concern." *Id.* at 78a.

C. This Case Presents No Exhaustion Issue

Petitioner's suggestion that the Seventh Circuit's decision conflicts with this Court's repeated holding that exhaustion of state remedies is not a prerequisite to actions under §1983 is plainly frivolous. As this Court so succinctly said in *Williamson*:

> [T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial...review.... *Patsy* concerned the latter, not the former.

Williamson, supra, 473 U.S. at 193 (construing *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982)).

In this case, petitioner never gave the "initial decisionmaker" an opportunity to make a decision. This case, therefore, presents no question concerning his obligation to exhaust state procedures for the review of such an initial decision.

III. THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING THE SEVENTH CIRCUIT'S APPLICATION OF THE RIPENESS DOCTRINE TO BAR PETITIONER'S "AS APPLIED" CHALLENGE

A. Petitioner Has Failed To Cite Decisions of the First, Tenth and Eleventh Circuit Courts. Both Those Decisions and the District Court Opinions From Those Circuits That Petitioner Does Cite Are Consistent With The Seventh Circuit's Decision

For the proposition that the First, Tenth and Eleventh Circuits are in conflict with the Seventh Circuit's decision in this case, petitioner cites only district court opinions from those circuits. *See Lerman v. City of Portland*, 675 F. Supp. 11 (D. Me. 1987); *Oberndorf v. City and County of Denver*, 653 F. Supp. 304 (D. Colo. 1986); *Upah v. Thornton Development Auth.*, 632 F. Supp. 1279 (D. Colo. 1986); and *Carroll v. City of Prattville*, 653 F. Supp. 933 (M.D. Ala. 1987). In each case, however, petitioner has failed to advise this Court of Courts of Appeals decisions in

those Circuits that are entirely consistent with the Seventh Circuit's decision in this case. *See Culebras Enterprises Corp. v. Rivera Rios*, 813 F. 2d 506 (1st Cir. 1987); *ACORN v. City of Tulsa*, 835 F. 2d 735 (10th Cir. 1987); and *Corn v. City of Lauderdale Lakes*, 816 F. 2d 1514 (11th Cir. 1987).[11]

1. There Is No Conflict With the First Circuit

In *Culebras*, *supra*, the First Circuit specifically held that the *Williamson* ripeness doctrine applied to defeat plaintiff's due process claim for damages resulting from the adoption of a zoning ordinance that allegedly prevented the development of plaintiff's property. 813 F. 2d at 515-16. This result was reached despite the fact that, in *Culebras*, the local government had officially acted not only to adopt the challenged zoning ordinance but also to deny the plaintiff's subsequent request for administrative relief from that zoning ordinance. *Id.* at 509. In contrast, in this case, the respondent local governments have never taken any official action whatever with regard to petitioner.

There is obviously no conflict between *Culebras* and the Seventh Circuit's decision in this case. Furthermore, however, it is also clear that the *Culebras* court was dealing at at least the second or third level of ripeness analysis under *Williamson* and *MacDonald* while the Seventh Circuit had no occasion to go beyond

---

[11]It should also be noted that there is no inconsistency between the Seventh Circuit's decision in this case and any of the District Court cases cited by petitioner. In each of those cases, the "initial decisionmaker" had arrived at a "final decision" that carried the plaintiff past the threshold of ripeness. In *Lerman*, *supra*, the challenged official action was the already completed demolition of a building without affording its owner procedural due process prior to the demolition. In *Oberndorf*, *supra*, the challenged activity was the city council's formal adoption of an urban renewal plan designating the plaintiff's property as blighted. In *Upah*, *supra*, five separate official actions, all formally approved by the local governing body, were alleged to violate the plaintiff's constitutional rights. In *Carroll*, *supra*, the court expressly noted that the defendants did not challenge "plaintiff's allegation that the defendants' actions are administratively final...." 653 F. Supp. at 942 n. 12. The court dismissed the taking claim solely because plaintiff had failed to exhaust an adequate state compensation remedy under the second prong of the *Williamson* test. *Id.* at 942.

the threshold question of "whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Williamson*, *supra*, 473 U.S. at 193.

2. There Is No Conflict With the Tenth Circuit

In *ACORN*, *supra*, as in this case, the plaintiff ACORN had been given indications by subordinate public bodies and their staffs that its request to use a public park would not be approved. However, under applicable local law, only the City Board of Commissioners had authority to officially make that decision. ACORN, however, never asked the Board of Commissioners to authorize its activity. 835 F.2d at 737-38.

Under these facts, the Tenth Circuit declined to consider ACORN's "as applied" challenges to the ordinance in question because the ordinance "...has not been applied to *ACORN*." *Id.* at 743. The Tenth Circuit did, however, note that ACORN's facial challenge was ripe because "a first amendment challenge to the facial validity of a statute is a strictly legal question; it does not involve the application of the statute in a specific factual setting." *Id.* at 740. In so holding, the court carefully distinguished between the application of the ripeness doctrine to facial challenges and its application to "as applied" challenges:

> We emphasize, however, that our holding that ACORN has standing to challenge these ordinances and that this case is ripe for decision does not expand the substantive issues that we should address beyond those appropriate to a challenge to the facial validity of the ordinances.

Id. In the present case, of course, petitioners "assure us that they do not challenge the facial validity of the agreement between Lake County and Grayslake." Pet. 14a. The Seventh Circuit properly concluded that petitioner's "as applied" challenge is not ripe for the same reason that the Tenth Circuit concluded that ACORN's "as applied" challenge was not ripe: There has been no decision by the only body authorized to make the decision.

3. There Is No Conflict With the Eleventh Circuit

In *Corn*, *supra*, the Eleventh Circuit expressly interpreted the second prong of *Williamson* (failure to pursue a state compensation remedy) as making no distinction, for ripeness purposes, between due process claims and taking claims. 816 F. 2d at 1516 n. 2. Here, once again, the Eleventh Circuit's ripeness analysis proceeds at a level that the Seventh Circuit was never required to reach, but certainly that analysis is in no way inconsistent with the Seventh Circuit's decision.

B. The Second, Third, Fourth, Fifth and Eighth Circuit Decisions Cited by Petitioner Do Not Address the Ripeness Issue Decided by the Seventh Circuit

In support of its position that the Second, Third, Fourth, Fifth and Eighth Circuits disagree with the Seventh Circuit's interpretation of *Williamson*, petitioner cites seven opinions, most of which do not even mention *Williamson* or ripeness. *See Sullivan v. Town of Salem*, 805 F. 2d 81 (2d Cir. 1986); *Neiderhiser v. Borough of Berwick*, 840 F. 2d 213 (3d Cir. 1988), and *Bello v. Walker*, 840 F. 2d 1124 (3d Cir. 1988); *Scott v. Greenville County*, 716 F. 2d 1409 (4th Cir. 1983); *Suthoff v. Yazoo County Industrial Development Corp.*, 637 F. 2d 337 (5th Cir. 1981), *cert. denied*, 454 U.S. 1157 (1982); and *Mitchell v. Mills County*, 847 F. 2d 486 (8th Cir. 1988), and *Littlefield v. City of Afton*, 785 F. 2d 596 (8th Cir. 1986).

1. There Is No Conflict With the Second Circuit

Petitioner's treatment of *Sullivan*, *supra*, is, to put it charitably, deceptively confused. In a single paragraph, petitioner weaves together random quotes from different sections of the opinion to give the appearance that the Second Circuit said just the opposite of what it actually said. *Sullivan* does not even mention ripeness. However, what it does say supports respondents. In *Sullivan*, various subordinate town officials told Sullivan that his subdivision roads would be accepted if improved in a certain

way. 805 F.2d at 83. However, after Sullivan so improved the roads, the official town body responsible for accepting the roads, declined to do so. Sullivan brought suit.

The Second Circuit held that Sullivan had not stated a cause of action under the due process clause, noting specifically that:

> This is particularly true because it was within Sullivan's power under Connecticut law to convene a town meeting to consider the question of acceptance, without the direct participation of the planning and zoning commission or the board of selectman. All that was needed was the application of 20 qualified voters.

Id. at 84. It would have been far easier than that for petitioner to get a formal decision. He could have simply gone to a County or Village Board meeting and made his request and presented his case. He simply did not do so.

2. There is No Conflict With the Third Circuit

In both *Neiderhiser*, *supra*, and *Bello*, *supra*, the defendant governments had acted finally to deny the requested permits. In each case, those denials were sufficiently final to have been appealed through, and reversed by, the State court system. Both cases arose on pre-trial motions, and the question was not whether there had been a denial, but simply whether the plaintiffs had sufficiently plead that the denial was constitutionally improper. Thus, neither of these Third Circuit decisions contributes anything to an understanding of the Seventh Circuit's opinion, which is based squarely on the fact that there never was even an initial denial of petitioner's request for sewer because petitioner "... failed even to present a formal application to either the Village of Grayslake or Lake County." Pet. 12a.

Suburban Trails, Inc. v. New Jersey Transit Corp., 800 F. 2nd 361 (3d Cir. 1986), is a Third Circuit decision more in point. In that case, based on facts closely analogous to this case, the Third Circuit concluded that neither constitutional nor antitrust claims were ripe for review. There, as here, plaintiff had made preliminary inquiries concerning its eligibility for a grant and had been given preliminary indications that the grant would be

denied. Plaintiff then brought suit. The Third Circuit found the controversy not ripe, stating:

> Although staff members had expressed their disapproval, a formal denial must come from the Board itself. . . . We are thus presented with a situation in which the allocation of buses–the plaintiffs' principal concern–is subject to a decision by N.J. Transit which has not yet been formally made. . . . Until an agency has completed its work by arriving at a definitive decision, judicial review is premature.

Id. at 365. The Seventh Circuit said neither more nor less.

3. There Is No Conflict With the Fourth and Fifth Circuits

Scott, *supra*, and *Suthoff*, *supra*, were decided before *Williamson*. They obviously say nothing about the Fourth and Fifth Circuits' interpretation of *Williamson*. Neither so much as mentions the ripeness doctrine.

The Fourth Circuit did address *Williamson* in *Plakas v. County of Middlesex*, noted 803 F. 2d 714 (4th Cir. 1986) (op. not for pub.; text in Westlaw). In that case, the Fourth Circuit applied the second prong of *Williamson* (failure to pursue a state compensation remedy) to bar as unripe *both* a takings claim and a due process claim. The Seventh Circuit, of course, had no need to reach the second prong of *Williamson*, and there is clearly nothing in its decision of this case that is in conflict with *Plakas*.

4. There Is No Conflict With the Eighth Circuit

In *Mitchell*, *supra*, and *Littlefield*, *supra*, the challenged activity or ordinance had been formally, finally and definitely applied to the plaintiff and there was, therefore, no issue concerning threshold ripeness.

Neither *Williamson* nor ripeness was even mentioned in *Mitchell's* discussion of due process. Plaintiff alleged that its property had been damaged by the building of a county road, obviously a completed action.

The *Littlefield* due process claim was ripe because (1) the

Littlefields had, unlike petitioner here, filed a proper application for a building permit and had "complied with all the *legal* requirements contained in the ordinances of the City of Afton" for issuance of such a permit, 785 F.2d at 602 (original emphasis) and (2) the city council, unlike the respondent governments here, had formally acted on that permit request and had refused to issue the permit unless the Littlefields " 'conveyed... additional public right of way' " to two neighboring property owners. *Id.* at 598-99. Thus, unlike the situation here, the plaintiff had formally and properly applied for a permit, and the initial decisionmaker had arrived at a formal and final position to deny that permit. The presence of those circumstances in that case led the Eighth Circuit to conclude that plaintiff's claim was ripe; the absence of those circumstances in this case led the Seventh Circuit to the opposite conclusion. In this, there is no conflict.[12]

C. There Is No Conflict With the Ninth Circuit

Finally, while conceding that the Ninth Circuit has reached results similar to the Seventh Circuit's decision in this case, *see Kinzli v. City of Santa Cruz*, 818 F. 2d 1449, *modified*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 775 (1988), and *Herrington v. County of Sonoma*, 834 F. 2d 1488 (9th Cir. 1987), petitioner argues that *Herrington* cannot be reconciled with the Seventh Circuit's decision. Petitioner makes this argument by stringing together unrelated snippets from *Herrington*. Pet., p. 21.

It is especially interesting to note that, in arguing that there is a conflict between this case and *Herrington*, petitioner cites only passages from part A.2 of *Herrington* ("*Ripeness--MacDonald's Reapplication Requirement*"). The Seventh Circuit on the other hand very carefully cited only part A.1 of *Herrington* ("*Ripeness--Kinzli's Final Decision Requirement*"). *See Her-*

---

[12]It should be noted that the Eighth Circuit has apparently retreated from its holding in *Littlefield* that the denial of a zoning permit in violation of state law states a federal substantive due process cause of action. *Lemke v. Cass County*, 846 F. 2d 469 (8th Cir. 1987).

rington, supra, 834 F.2d at 1494 and 1497. Thus, despite petitioner's creative cutting and pasting, it is clear that *Herrington* is fully consistent with the Seventh Circuit's opinion concerning the crucial issue in this case–whether petitioner has satisfied the threshold requirement enunciated in *Agins, Williamson* and *MacDonald* by demonstrating that "the initial decisionmaker has arrived at a definitive position":

> "The preliminary question for us is whether the *Kinzli* final decision requirement, derived from the Supreme Court's taking cases, applies to the due process and equal protection claims asserted by the Herringtons. We conclude that the requirement applies. . . ."

Id. at 1494. *See also Kinzli, supra* (abandonment of application prior to a final decision rendered unripe taking, due process and equal protection claims).

Herrington's subsequent discussion of the differences between taking claims and due process claims for purposes of applying the *MacDonald* reapplication requirement is relevant only after the "final decision" threshold has been crossed. In this case, petitioner never crossed that first threshold. There was, therefore, no need for the Seventh Circuit to discuss subtle differences that might be relevant if he had. *Herrington* may raise the question petitioner asks this Court to address. This case clearly does not.

IV. THE SEVENTH CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S JUDGMENT N.O.V. ON PETITIONER'S ANTITRUST CLAIM

A. The Antitrust Claim Was Not Ripe

Although petitioner repeatedly cites *Patrick v. Burget,* 108 S. Ct. 1658 (1988) as though it were a landmark decision on ripeness, Pet., pp. i, 15, 26-27, ripeness was never raised nor even mentioned. Petitioner, however, concludes that because the facts mentioned in *Patrick* reflect that the petitioner there brought suit before the completion of the peer-review proceedings he was challenging, one can imply that a final decision was

unnecessary for ripeness. However, in *Patrick*, plaintiff claimed that the mere existence of the peer review process violated the Sherman Act; he contended that respondents "*initiated* and participated in the hospital peer-review proceedings to reduce competition." *Id.* at 1661 (emphasis added). Petitioner here makes no such claim; his claim is based on the denial of service. Pet. 14a. The Seventh Circuit, therefore, correctly held that because petitioner was not claiming that the mere existence of the Grayslake sewer agreement operated as a restraint of trade, his challenge based on the wrongful application of that agreement was necessarily unripe in the absence of any evidence that it had ever been applied to him. *See Suburban Trails, Inc. v. New Jersey Transit Corp.*, 800 F. 2d 361, 368 (3d Cir. 1986).

B. Petitioner's Claim Is Barred by the State Action Doctrine

The Seventh Circuit's holding that "the defendants are immune from antitrust liability under the state action doctrine," supported by two pages of analysis in the court's opinion, is clearly correct. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34, (1985). It is also clearly an alternative ground of decision and not, as petitioner suggests, merely "dicta." Pet., p.14 n.10. As this Court has consistently held, "where a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*." *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) (citations omitted).

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

CLIFFORD L. WEAVER
ROBERT C. NEWMAN
FRED P. BOSSELMAN

Attorneys for Respondents